Supreme Court, U.S.
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No. 00-1080

In The

Supreme Court of the United States

RANDY BRITTON,

Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION, NEW YORK STOCK EXCHANGE, INC., NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., DONALDSON, LUFKIN & JENRETTE SECURITIES CORPORATION, AND JOHN R. WILLSEN,

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals for the Second Circuit

REPLY TO BRIEFS IN OPPOSITION

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EXCEPTIONS TO THE EXHAUSTION REQUIREMENT: FUTILITY AND CONSTITUTIONAL QUESTIONS

There are over 500,000 Registered Representatives and 2,000 Broker-Dealers who will be directly affected by this Court's decision in this case. Title VII of the Civil Rights Act of 1964, as interpreted by the Ninth Circuit in *Gregory v. Litton Systems*, 316 F. Supp. 401, 403 (C.D. Ca. 1970) *affirmed* 472 F.2d 631 (9th Cir. 1972), prohibits an employer from asking an employee whether he or she has ever been arrested for anything that did not result in a conviction. Yet, SEC Rule 17a-3(a)(12)(i)(g) requires employers, without any immunity from Title VII or state employment discrimination lawsuits, to conduct the illegal arrest record inquiry. State anti-discrimination employment laws prohibit the arrest record inquiry, and they provide for damages. In New York, Courts allow $7,500 per illegal question. *Sheriff's Department v. State Div. of Human Rights*, 129 A.D.2d 789, 791, 514 N.Y.S.2d 779, 781 (1987). The nation deserves an answer to this contradiction because an employer cannot simultaneously meet these conflicting federal and state mandates: securities industry employers are faced with conflicting directives that put them in violation of federal securities laws if they fail to make the illegal arrest record inquiry, and in violation of state and federal anti-discrimination employment laws if they do.

In 1975, the SEC determined that SEC Rule 17a-3(a)(12)(i)(g), a federal regulation, trumped Title VII of the Civil Rights Act of 1964, a federal statute, because the SEC determined that the arrest record inquiry, although outlawed by Title VII and state anti-discrimination laws, could be legally required by federal regulation.[1] It is hornbook law that federal statutes trump federal regulations[2], if they con-

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[1] *Order Approving Change to SEC Rule 17a-3*, Exchange Act Release No. 11615, 7 SEC Docket 710, 1975 SEC LEXIS 951 (August 25, 1975).

[2] *Contini v. Hyundai Motor Company*, 840 F. Supp. 22, 24 (S.D.N.Y. 1993)("To hold a federal regulation binding if a federal statute expressly states the contrary, would, however, violate federal law contrary to the Supremacy Clause contained in Article VI § 2 of the Constitution.")

flict, as they do here, so SEC Rule 17a-3(a)(12)(i)(g) cannot stand in opposition to Title VII of the Civil Rights Act of 1964. When the SEC amended SEC Rule 17a-3(a)(12)(i)(g) in 1975, it exceeded its statutory authority. Congress passed both the Civil Rights Act of 1964 and the 1975 Amendments to the Exchange Act of 1934. Pub. L. No. 94-29, 89 Stat. 97 (1975). While passing the 1975 Amendments, Congress was aware of the 1972 *Gregory v. Litton Systems* case which found that arrest record inquiries violated Title VII. That is why Congress set the statutory bar at *convictions* only. 15 U.S.C. § 78c(a)(39)(1999). The SEC is without statutory authority to change the conviction inquiry mandated by Congress to an arrest inquiry mandated by the SEC. Had the SEC stayed within the bounds set by Congress, and sought convictions only in SEC Rule 17a-3(a)(12)(i)(g), there would be no conflict between federal securities law and federal employment law because Title VII bars arrest inquiries, not conviction inquiries.

State anti-discrimination employment law, which also prohibits arrest inquiries, cannot be pre-empted especially when it outlaws the same acts as a federal statute, Cf. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 108, 103 S. Ct. 2890, 2906 (1983), because any Federal law attempting to cause, foster, or condone racial discrimination would violate the 5th and 14th Amendments. *Reitman v. Mulkey*, 387 U.S. 369, 381, 87 S.Ct. 1627, 1634 (1967); *Bell v. Maryland*, 378 U.S. 226, 292, 84 S. Ct. 1814, 1850 (1964)(Goldberg, Douglas, JJ., and Warren, C.J., concurring)("The Fourteenth Amendment was in part designed to provide a firm constitutional basis for the Civil Rights Act of 1866, 14 Stat. 27, and to place that legislation beyond the power of congressional repeal.")

The NASD concedes that "[q]uestion 22B [on the 1990 Form U-4 I submitted] is mandated by SEC Rule 17a-3(a)(12)(i)(g) . . . ." NASD Opp. Page 2. This concession strengthens my state action argument, *Desiderio v. NASD*, 191 F.3d 198, 206 (2nd Cir. 1999), because it means that the race discrimination that results from the non-conviction in-

quiry is mandated by the state. State mandated race discrimination violates the equal protection clause. *Lugar v. Edmondson Oil, Co.*, 457 U.S. 922, 937 (1982). Because the SEC exceeded its statutory authority and ignored an EEOC ruling that the NYSE's arrest record inquiry violates Title VII, page 1a, the SEC's racial discrimination must be deemed intentional. The NYSE also ignored the EEOC's ruling, page 2a, but it sent the documents to the SEC. Page 3a.

State Anti-Discrimination/Fair Employment Laws are incorporated by reference into Title VII's federal regulatory scheme. *Kremer v. Chemical Construction Corporation*, 456 U.S. 461, 477, 102 S. Ct. 1883, 1895 (1982)("state fair employment practice laws are explicitly made part of the Title VII enforcement scheme"). Therefore, on the pre-emption battlefield, state anti-discrimination employment laws are encased in federal, not merely state, armor. Only a change in the U.S. Constitution that makes racial discrimination legal can set up an environment whereby a state anti-discrimination employment law can be pre-empted, repealed, or rendered impotent.

Nevertheless, by using a combination of standing and subject matter jurisdictional defenses, the SEC has avoided judicial scrutiny of the illegal arrest record inquiry, on the merits, for over 25 years. The EEOC determined that the securities industry's arrest record inquiry violated Title VII back in 1974, page 1a, but it has taken this long for someone to bring this issue to this Court's attention. Justice Ginsburg made an initial inquiry into this issue while she sat on the D. C. Circuit Court of Appeals, but Justice Ginsburg stopped short of a ruling because all of the plaintiffs were white and there were no allegations of racial discrimination (this is a prime example of the SEC's standing defense). *Association of Investment Brokers v. SEC*, 676 F.2d 857, 861 n.11 (D.C. Cir. 1982)("Petitioners do not complain of any adverse racial impact occasioned by the arrest question.") However, Justice Ginsburg did cite the *Gregory v. Litton Systems* decision for the proposition that the arrest record inquiry is illegal and will be enforced, if an African-American sues. After two trips to the Circuit Courts, an EEOC ruling, and 8 years of

litigation in this case, it is clear that the SEC has no intention of changing SEC Rule 17a-3(a)(12)(i)(g).

This explains why it is futile to exhaust my administrative remedies before the SEC. If the SEC will not listen to the EEOC or Justice Ginsburg, it is clearly futile for me to re-argue the same points that the EEOC and Justice Ginsburg have already made. Accordingly, access to the Courts without exhausting my administrative remedies is appropriate because the Courts will not require futile attempts to re-litigate before an agency that has already ruled against the points offered and is actively enforcing the rule. *Houghton v. Shafer*, 392 U.S. 639, 640, 88 S. Ct. 2119, 2120 (1968); *Guitard v. U.S. Secretary of Navy*, 967 F.2d 737, 741 (2nd Cir. 1992)("Exhaustion of administrative remedies may not be required when: [1] administrative appeal would be "futile"; and [2] in certain instances a plaintiff has raised a "substantial constitutional question.") Whether the illegal arrest record inquiry mandated by the SEC, with its attendant intentional racial discrimination, violates the equal protection clause is a substantial constitution question. Whether information requests from the NYSE and the NASD are constrained by the Self Incrimination Clause of the Constitution is also a substantial constitutional question, which, when coupled with the futility of appealing to the SEC, excuses my failure to exhaust my administrative remedies with the SEC.

Because of the SEC's usurpations, the NYSE and the NASD do not believe that Title VII of the Civil Rights Act of 1964 or the Constitution applies to them even though they have the power to "interfere" with employment opportunities on Wall Street. The holding of this Court must tell them the truth: no one is above the law. See the NYSE letter at page 2a, which is a part of the 1975 SEC Rule 17a-3 file, which explicitly espouses the "above the law" point of view.

Clearly, something is rotten on Wall Street when DLJ claims to have fired me for alleged misconduct, and then DLJ pays me $150,000, notwithstanding my *alleged* misconduct, to keep quiet. My alleged misconduct included (1) allegedly lying on an employment form (Form U-4 question

22b) by leaving off Maloney's[3] trumped up assault charges as I am permitted to do by Massachusetts and New York law, (2) refusing to supply a written statement to DLJ and the NYSE concerning the nature and circumstances surrounding favorably closed, non-investment related, misdemeanor arrests and charges that did not result in a conviction as I am permitted to do by the Self Incrimination Clause of the Fifth Amendment as well as state anti-discrimination employment law, and (3) alleged insubordination when I wrote a letter, page 4a, refusing to supply the illegally requested information that informed DLJ and the NYSE that I would be standing on my rights. As explained in the Petition with irrefutable syllogistic logic, Pet. page 27, I did not lie on the Form U-4 and *all* of my actions are protected activity under state and federal constitutional and anti-discrimination employment laws.

> No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by this subsection.

Mass. Gen. L. Ch. 151B, § 4 ¶ 9 (1991)(This statute prohibits the arrest inquiry).

CONFLICTS BETWEEN THE CIRCUITS

Whether the NYSE and the NASD are state actors or not determines whether the NYSE and the NASD must comply with constitutional strictures, including the prohibition on compelling a citizen to testify against himself without any offer of use immunity before the statute of limitations has run on the underlying arrests/charges. Following well-settled Second Circuit precedent, which conflicts with the Ninth and the Seventh Circuits, the Second Circuit held that

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[3] See U.S. Supreme Court Docket Number 00-1568 which recounts my $200,000 federal jury malicious prosecution victory over a rogue Boston Police officer, Patrick J. Maloney.

the NYSE and the NASD are private entities. *United States v. Solomon*, 509 F.2d 863, 871 (2nd Cir. 1975)(NYSE is not a state actor) and *Desiderio v. NASD, Inc.*, 2 F. Supp. 2d 516, 519 (S.D.N.Y. 1998)("NASD is not a state actor"). These cases were wrongly decided as they did not follow this Court's three-prong test for finding state action by private parties. *Duffield v. Robertson Stephens & Company*, 144 F.3d 1182, 1200-1201 (9th Cir. 1998) *quoting Blum v. Yaretsky*, 457 U.S. 991, 1004-05, 102 S. Ct. 2777 (1982); *R. J. O' Brien & Assoc., Inc. v. Pipkin*, 64 F.3d 257, 262 (7th Cir. 1995)(National Futures Association "was a government actor in performing the registration function"). The Ninth Circuit's *Duffield* opinion states that it is clear that the NYSE and the NASD have been state actors since at least 1993 when SEC Rule 15b7-1 was passed. Some commentators argue for state action based on the 1975 Amendments to the Exchange Act of 1934. Pamela R. Chepiga, *The Right to Exercise Fifth Amendment Privilege in Exchange and SRO Investigations: A Time for Re-Examination*, 648 PLI/Corp 797 (June 15, 1989).

Magistrate Judge Lee cited Second Circuit authority for the proposition that the NYSE and the NASD are not subject to the strictures of Title VII of the Civil Rights Act of 1964 when there is no direct employer-employee relationship. *Neither the District Court nor the Second Circuit objected to Magistrate Judge Lee's analysis, thereby adopting same.* This holding conflicts with the Ninth Circuits holding in *The Association of Mexican-American Educators v. State of California*, 231 F.3d 572, 580 (9th Cir. 2000)(en banc) *citing Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338, 1340-41 (D.C. Cir. 1973); *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 202 (3d Cir. 1994); *Christopher v. Stouder Mem'l Hosp.*, 936 F.2d 870, 876-77 (6th Cir. 1991); *Pardazi v. Cullman Med. Ctr.*, 838 F.2d 1155, 1156 (11th Cir. 1988); and *Shehadeh v. Chesapeake & Potomac Tel. Co.*, 595 F.2d 711, 722 (D.C. Cir. 1978). As can be seen from the above citations, the Third, Sixth, Ninth, Eleventh, and the D.C. Circuits conflict with the Second Circuit's holding that only a direct employer can violate Title VII of the Civil Rights Act of 1964. All of the above cases have followed the "interference" model first articulated in *Sibley*. Under NYSE Rule 308

(1991), the NYSE can veto the hiring of employees by its member Broker-Dealers. Congress intends that the power to veto employment opportunities be constrained by Title VII of the Civil Rights Act of 1964.

Another conflict between the Circuits lies in whether the mere filing of a Form U-5, without more, is a step in a NASD or a NYSE quasi-judicial proceeding. Judge Wood and the Second Circuit have taken the position that the mere filing of a Form U-5 is a step in the quasi-judicial process that cloaks *all* Form U-5's with absolute privilege. Pet. page 22a. This position is at odds with both the Sixth and the Seventh Circuits. *Baravati v. Josephthal, Lyons & Ross, Inc.*, 28 F.3d 704, 708 (7th Cir. 1994); *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 137 (6th Cir. 1996)("The submission of a Form U-5, however, is not part of the NASD's quasi-judicial regulatory process.")

FORM U-5

If the mere filing of a Form U-5 is not a part of the NYSE's and the NASD's quasi-judicial proceedings, then the Form U-5 submitted in my case is not entitled to absolute privilege. There is overwhelming evidence to support malice so it will be easy to overcome DLJ's qualified immunity defense. If the constitutional restraints on state actors are applied to the NYSE and its rules and regulations, as is required by law so that it passes constitutional muster, *Rust v. Sullivan*, 500 U.S. 173, 190 (1991), then it is clear that no NYSE rule or regulation, including NYSE Rule 476, required my disclosure of information that is protected by the Self Incrimination Clause of the Fifth Amendment. Therefore, the Form U-5 which states that I was terminated for "inability to comply with NYSE regulations" is false. In any event, "inability" is false because, at most, "unwilling" is fair.

Because of the devastating blackballing effect that a false Form U-5 has on one's career in the securities industry, *Baravati v. Josephthal, Lyons & Ross, Inc.*, 28 F.3d 704, 708 (7th Cir. 1994), and the amount of money that I could have made, my damages are at least six-figured and perhaps in the eight figure range. *See E.g., Waite v. Dean Witter Reynolds, Inc.*,

1990 WL 463825 (False Form U-5 alleging violations of Exchange rules caused jury to award 23 million dollars).

FEDERAL QUESTIONS

DLJ does not claim that NYSE or NASD Rules and Regulations required DLJ to file the Form U-5. DLJ has cited footnote 2 to NASD Notice to Members 92-19 for the first time, but that footnote does not say what DLJ claims. It merely specifies that a Form U-5 is the NASD's designated Form. It does not alter the fact that Form U-5's are not required to be filed unless an individual has registered or at least taken and passed an Exam. In fact, NASD Notice to Members 76-43 states that DLJ "should not" have filed a Form U-5 in my case because I had neither registered nor taken and passed the Series 7 Examination. Once the SEC approves an NASD rule, the NASD has no power to amend its own rules without SEC approval. 15 U.S.C. § 78s(b)(1). The SEC has not approved a change to NASD Notice to Members 76-43.

Although not itself approved by the SEC, NASD Notice to Members 76-43 is a valid federal rule because when it was issued on December 27, 1976, it was reasonably and fairly implied by an existing rule of the NASD, namely the 1976 version of NASD by-law Art IV § 3(a); therefore, it did not need to be specifically approved by the SEC. 17 C.F.R. § 240.19b-4(c)(1). Once established as a NASD policy, however, NASD Notice to Members 76-43 is elevated to Federal NASD Rule status. 15 U.S.C. § 78c(a)(27) (defining "rule" to include "stated *policies*, practices, and interpretations"). 17 C.F.R. § 240.19b-4 defines "stated *policies*, practices, and interpretations" to include "any *statement* made generally available to the membership of . . . the self regulatory organization . . . that establishes or changes any standard, limit, or guideline with respect to: (i) the rights, obligations, or privileges of specified persons . . . or (ii) the meaning, administration, or enforcement of an existing rule." As a federal rule, NASD Notice to Members 76-43 is just as binding on the parties and this Court as if it were a federal regulation or statute. *Queens Penn Corporation v. Mazzucco*, 19 Misc. 2d 567, 568, 187 N.Y.S.2d 313, 315 (Sup. Ct. 1959)(A

Federal *rule* or regulation has the authority of statute and is as binding and effective as though enacted by Congress. . ..")

Because NASD Notice to Members 76-43 states that a Form U-5 should not be submitted in my case, DLJ violated federal securities law when it filed the Form U-5 in my case. Because New York and Federal law is incorporated by reference into the settlement agreement, DLJ materially breached ¶ 9 of the settlement agreement so rescission is appropriate.

It is also important to note that Judge Wood's Order, which the Second Circuit has adopted, assigns an absolute privilege to the Form U-5 *solely* because the statements are allegedly required by the NYSE and not because they were made in the course of a quasi-judicial proceeding *because there was no quasi-judicial proceeding*. Under New York law, a Form U-5, submitted pursuant to a legal duty, only rates a qualified privilege: the Second Circuit's *Fahnestock* opinion cites three New York Court of Appeals cases on point in support of its qualified privilege holding for Form U-5's. *Fahnestock & Co. v. Waltman*, 935 F.2d 512, 516 (2nd Cir. 1991) citing *Toker v. Pollak*, 44 N.Y.2d 211, 219, 376 N.E.2d 163, 166, 405 N.Y.S.2d 1, 5 (1978); *Mihlovan v. Grozavu*, 72 N.Y.2d 506, 509, 531 N.E.2d 288, 289, 534 N.Y.S.2d 656, 657 (1988) (per curiam), *Shapiro v. Health Ins. Plan of Greater New York*, 7 N.Y.2d 56, 60, 163 N.E.2d 333, 336, 194 N.Y.S.2d 509, 512-13 (1959). The Second Circuit panel that heard my case ignored these controlling New York and Second Circuit precedents.

Whether or not the filing of a Form U-5 is a step in the NASD's quasi-judicial process is the key question to be decided because it is clear that, under New York Law, a Form U-5 cannot gain absolute privilege status merely because it was submitted pursuant to a legal duty.

RESPONDENTS' MINOR POINTS

DLJ claims that the state actor question was not preserved below. This is not true. I have continually challenged the constitutionality of Willsen's arrest record inquiry. In my November 6, 1991 letter to Willsen and DLJ, I challenged the constitutionality of Willsen's inquiry. See page 4a. The November 6, 1991 letter was attached to the amended com-

plaint so the allegations raised in the November 6, 1991 letter are a part of the complaint for all purposes. Fed. R. Civ. P. 10. Even, the District Court gave me credit for opposing the arrest record inquiry on constitutional grounds. Pet. page 24a. In my brief to the Second Circuit at pages 21-34, I explicitly argue that "The NYSE and the NASD are State Actors who Must Abide by Constitutional Strictures." In these 13 pages, I attack the Second Circuit's holding in *Solomon*. The state actor issue was explicitly preserved below.

It is clear that Willsen is not listed in the settlement agreement as a third-party beneficiary, so Willsen is not protected by the settlement agreement in any event. It is also clear from the complaint and its attachments that Willsen was sued because he inquired about non-conviction arrests/ charges in violation of New York State anti-discrimination employment law. Magistrate Judge Lee had no trouble culling these facts from the first amended complaint, Pet. page 29a-30a, but Magistrate Judge Lee later said that these facts do not state a claim, Pet. page 58a-59a, even though these facts clearly state a claim under N.Y. Exec. Law §§ 296[6], 296[16]. Section 296[16] prohibits non-conviction arrest record inquiries, and Section 296[6] prohibits Willsen from encouraging DLJ to fire me for opposing their unlawful discriminatory practices. These claims were stated in the first action, so res judicata is inapplicable to Willsen.

CONCLUSION

This Court should grant certiorari to clear up the conflicts between the Circuits and to resolve the catch-22 that pits Title VII, and its incorporated state anti-discrimination employment laws, against SEC Rule 17a-3(a)(12)(i)(g).

Respectfully submitted,

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APPENDIX

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

March 6, 1974

Mr. Stanley Mazaroff
Venable, Baetjer and Howard
Attorneys-at-Law
1800 Mercantile Bank & Trust Building
Baltimore, Maryland 21201

Dear Mr. Mazaroff:

This is to acknowledge receipt of a copy of your letter to Mr. Robert M. Bishop regarding the New York Stock Exchange Rule on the use of arrest records.

The aforementioned rule is in violation of Title VII of the Civil Rights Act of 1964, as amended.

If we can be of assistance in this matter, please let us know.

Sincerely,

William A. Carey
General Counsel

By: Issie L. Jenkins
Associate General Counsel
Legal Counsel Division

BEST AVAILABLE COPY

Mr. Stanley Mazaroff
Venable, Baet[j]er & Howard
1800 Mercantile Bank & Trust Building
2 Hopkins Plaza
Baltimore, Md. 21201

March 13, 1974

Dear Mr. Mazaroff:

This is in response to your letter of February 14, 1974 inquiring about the Exchange's requirement concerning arrests, in light of the EEOC Decision in this area.

The requirement outlined in Rule 345.19 is consistent with S.E.C. Rule 17A3 which is promulgated under the Securities and Exchange Act of 1934. This rule states that a broker/dealer, as defined under 17A3(a), must make and keep a questionnaire or application for employment executed by each "associated person" (associated person is defined in subdivision H(ii)[)] and that it shall contain at least all the information outlined in (h) of the Rule, which includes "a record of any arrests, indictments or convictions for any felony or misdemeanor, except minor, traffic offenses."

In regard to EEOC Decision No. 72-1460 (March 19, 1972), CCH EEOC Decisions (1973) Paragraph 6341; Gregory v. Litton Systems, Inc., 316 F. Supp. 401, the Commission determined that in the particular circumstances of that case the employer engaged in an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964. This decision would not of course, necessarily be applicable to the broker-dealer community in light of the existing rules of the self-regulatory organizations and of the Security and Exchange Commission itself and the practical necessity which faces each broker-dealer employer to comply with those rules. Consequently whether or not Title VII of the Civil Rights Act of 1964 renders unlawful the request for arrest information under Exchange Rule 345.19 or SEC Rule 17A3(12) is, so far as we are aware, undecided.

It may interest you to know that the whole matter of arrests is currently under review by the staff of the Securities and Exchange Commission.

I trust that the above answers your questions.

Very truly yours,

(Signed) Robert M. Bishop

Robert M. Bishop
Senior Vice President

PKowalewski:hm

THE New York Stock Exchange

RECEIVED
OFFICE OF THE SECRETARY
JUN 23 1975

Mr. George A. Fitzsimmons
Secretary
Securities and Exchange Commission
500 North Capitol Street, N.W.
Washington, D. C. 20549

June 23, 1975

Re: File No. 57-563

We have had an opportunity to review the proposed amendment of Rule 17a-3(a)(12)(A)(8) under the Securities Exchange Act of 1934, modifying the requirement for the maintenance of arrest records by broker/dealers.

The Exchange believes that the attached correspondence, including an opinion from the Equal Employment Opportunity Commission, concerning arrest records, may be of assistance to the Commission in arriving at its decision to amend Rule 17a-3.

We appreciate your affording us the opportunity to comment on this proposal.

Very truly yours,

J. C. Buck

Attachment

Donaldson, Lufkin & Jenrette

Donaldson, Lufkin & Jenrette Securities Corporation • 140 Broadway, New York, NY 10005 • (212) 504-3000

Randy A. Brillen
Associate
DLJ Public Finance Division
(212) 504-3482

November 6, 1991

To: John R. Willsen
Senior Registration Specialist
Qualifications and Registrations
20 Broad Street
New York, NY 10005

Thru: Mr. Thomas Lee
Vice President/Director of Employment
Donaldson, Lufkin & Jenrette Inc.
140 Broadway
New York, NY 10005

Dear Sir:

I flatly refuse to furnish the information and/or documentation requested in Mr Willsen's letters to Tom Lee and/or in Mr. Rigg's memorandum to me. (These documents are attached.)

Neither the New York Stock Exchange nor Donaldson, Lufkin & Jenrette, Inc. has the authority to legally compel my disclosure of this information. I have asked repeatedly for the citation of the authority DLJ or the NYSE thinks it has to compel this disclosure, but only NYSE Rule 308 has been given, and it's not conclusive authority to request this information. (Needless to say, I was angry to find out that my job offer may be subject to the approval of a third party, the NYSE, 5 months after I have been performing the job. That should have been disclosed in the offer letter, if indeed my offer was contingent on the approval of a third party.) I have been threatened with disciplinary action, including summary procedures for the imposition of fines, pursuant to Exchange Rule 476A. I am disappointed that DLJ has chosen to side with the NYSE in this matter, especially given the circumstances under which I was hired. You have hardened my resolve to defy both the NYSE and DLJ. I believe that it is in the best interests of both DLJ and the NYSE to close this inquiry, before this matter escalates into a civil lawsuit with possible criminal and/or discriminatory charges being filed against the NYSE and/or DLJ. If I am in error, please send me a copy of the authority so that what appears to me to be an unconstitutional and statutorily illegal request can be legally responded to by me. I reiterate my desire to comply with all of the Laws, Regulations, and Rules governing my employment, but I also require that DLJ and the NYSE do no less.

I suspect someone from DLJ had better talk to me about this with an apology and the documents I requested in hand. This is wrong behavior, and I have made it my goal to make sure that it NEVER HAPPENS AGAIN TO ANYONE ELSE. My case wouldn't read well on the front page of the Wall Street Journal, New York Times, and/or USA Today. You can't give someone an unqualified offer letter on 20 Feb 91, and wait until they show up for their first day of work on 20 May 91 and demand that they submit to fingerprinting without having told them that the fingerprints will be used to actually check FBI files. New Department of Justice Regulations, for the first time, effective 6 Sept 1990, mandate that the applicant be told that a FBI records check will be conducted. See the new regulations concerning fingerprints that are attached. In addition, on the first day of work, I was forced to submit to a background and credit check. The drug test was demanded one week after I received the offer letter which did not disclose that any of this nonsense had to take place. In fact, when I asked the question